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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA, PHIL D'ANDREA, CHARLES GIOE and JOHN BOSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

PETITION

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,

Petitioners,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Harlan F. Stone and Associate Justices of the Supreme Court of the United States:

The petition of Louis Compagna, Paul De Lucia, Phil D'Andrea, Charles Gioe and John Rosselli by Wm. Scott Stewart, their counsel, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Summary of the Record.

Petitioners were indicted in the United States District Court, Southern District of New York, charged with conspiracy in connection with interstate commerce, to obtain,

by the use of threats, the payment of a large sum of money, from a group of corporations engaged in the motion picture business. After verdict and sentence their appeal to the United States Circuit Court of Appeals for the Second Circuit followed. All of your petitioners were there heard upon the same record, having been jointly tried. All convictions were affirmed.[1a] Your petitioners comprise five of the seven convicted.

The Indictment.

The indictment (R. 4, 5 and 6, Vol. I) consists of one count[1] and charges that your petitioners conspired with each other, Bioff, Browne and Circella and persons unknown, to violate the statute[2] known as the Anti-Racketeering Act Section 2 (a), (b), (d) of the Act of Congress approved June 18, 1934, c. 569, 48 Stat. 979, Section 420a (a), (b), and (d), of Title 18 United States Code.

The conspiracy is alleged to have been a continuing one from June 18, 1934 (the date of the passage of the Act), to the return of the indictment March 18, 1943.

The indictment charges, in the language of the Act, that in connection with and relation to acts affecting foreign and interstate trade and commerce, the defendants conspired to obtain, by the use of and threat to use, force, violence and coercion, the payment of over a million dollars, from a group of corporations, referred to as the victims, including

LOEWS, INC.,
PARAMOUNT PICTURES, INC.,
TWENTIETH CENTURY FOX FILM COMPANY, and
WARNER BROS. PICTURES, INC.,

1a We have copied the opinion of the Circuit Court as an appendix to our brief. To which we have added notes, designed to show how wrong and unjust it is.

1 We have copied the indictment in full, as an appendix to our brief.

2 We have copied the Statute as an appendix to our brief.

and other firms, persons and corporations whose names are to the Grand Jurors unknown,

It is alleged that Browne, Bioff, Circella and Kaufman were connected with a labor union, *i. e.*, the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, called the IATSE.

> That the victims were engaged in interstate commerce in the production, distribution and *exhibition* of motion pictures, that the defendants would dominate, control and direct the IATSE, that the million dollars would be obtained with the consent of the victims, induced by wrongful use of force and fear by demanding that the victims pay for *protection*, viz., to prevent and dissuade the defendants from restraining, impeding and obstructing, interstate distribution and *exhibition* of motion pictures throughout the United States and otherwise injuring and destroying the business of the victims. (Italics supplied.)

Preliminary Motions.

A written demurrer and motion to quash (R. 14, Vol. I), a special plea in bar (R. 19, Vol. I) and a motion for a bill of particulars (R. 28, Vol. I) and a motion for severance (R. 45, Vol. I) were presented in due course. All of these motions were decided against the defendants. (R. 37, Vol. I)

Disposition as to Defendants in Trial Court.

Ralph Pierce was directed out of the case at the conclusion of the evidence. (R. 7d, Vol. I) Frank Nitti died before the trial and the case was dismissed as to him. (R. 7b, Vol. I) Kaufman was sentenced to seven years imprisonment and to pay a fine. The remaining defendants received the maximum sentence, ten years and ten

thousand dollars fine. Your petitioners are in the penitentiary, bail having been denied upon the day of judgment.

The Evidence.

George Browne (R. 1014, Vol. II, fol. 3042) was International President of the labor union. In the various local unions, members worked at the operation of moving picture machines and, in Hollywood, various craftsmen, members of the union, were engaged in the production of moving picture films. Before Browne was elected in 1934, the former International President had lost a strike in Hollywood. The loss of this strike is explained by the fact that other unions failed to cooperate. Instead of forcing their demands upon the employers, the strike failed and resulted in a loss of membership to the IATSE. The then President lost prestige and Browne was elected without opposition.

It appears that during all of the time in question, the employers and employees in Hollywood had been working under what is known as a basic agreement. The representatives of Employers and Labor met annually and formed an agreement. Wages and working conditions were settled for the period. When the IATSE lost their prestige and power, they were not included in the basic agreement with the other unions. After Browne was first elected in 1934, he appointed Bioff as his personal representative and Bioff and Browne proceeded to restore the power of the IATSE in Hollywood by the following method.

The producers in Hollywood are so closely connected with the exhibitors that neither the producers nor the exhibitors could withstand a strike in the Chicago theaters. Bioff and Browne took advantage of this tie up, by exerting pressure upon the exhibition end of the entire struc-

ture. They called a strike against the exhibiting chain in Chicago in 1935. This strike lasted only a few hours and was sufficient to cause the executives of the producers to run to Bioff and Browne to find out what they must do in order to stop the strike and avert further labor trouble. Bioff and Browne demanded that the IATSE be restored to power in Hollywood and forced this, and many other advantages, for the International Union.

Subsequently, Bioff and Browne took advantage of the power of the position they found themselves in after their jurisdiction was restored, and collected large sums of money from those engaged in the production, distribution and exhibition of moving pictures.

Browne and Bioff were prosecuted and convicted of the substantive offense, prohibited by the Anti-Racketeering Act before the return of this indictment. After their conviction, they appeared before the grand jury and in this trial as witnesses for the prosecution. They furnished evidence of circumstances from which the jury found that these defendants were guilty of the conspiracy charged. The defendants did not take the stand. The defendants called some witnesses and contested some of the facts at the trial. Your Honors, of course, are not requested to weigh the evidence.

One Barger testified that he operated a burlesque theater in Chicago. He was an exhibitor of motion pictures. He carried some of your petitioners on his payroll. Although he testified before the grand jury, he was not named or described as one of the victims.

One Rio was said to be one of the leaders of the conspirators and much is made of what Bioff testified that Rio said and did. Rio also was known to the grand jury, yet Rio was not named as a conspirator.

The date alleged is the date of the passage of the Act, the evidence showed a date of formation weeks before. The place of the formation of the conspiracy was Riverside, a suburb of Chicago, Illinois. As we have said, the conspiracy was alleged to be a continuing one. The evidence took a wide range, as to time, place and persons.

Your petitioners were transported from home across the continent for trial in New York, a jurisdiction foreign not only to them, but to nearly all of the witnesses. This injustice was accomplished by a direct positive and false allegation that your petitioners formed a conspiracy in New York. Every conceivable motion for relief was made without success, and finally a record on appeal was presented to the Circuit Court disclosing a fatal variance between the indictment and the proof as to venue. The record here shows further that the grand jury knew that the venue allegation was false. The government never claimed to have any evidence in support of the venue allegation. Not the slightest effort was made by the government officials to excuse or justify this breach of the constitutional rights of your petitioners (the record shows the proceedings in full), and the Circuit Court has not only sanctioned this departure by the trial court, but has dismissed our complaint as trivial and of no importance.[3]

This prosecution is based upon a statute, as we have said, relating to interstate commerce. Without acts relating to interstate commerce, your petitioners should have been discharged.[4] There is no proof of any act relating

[3] Your Honors will not find the word venue mentioned in the opinion. This failure to state our point was not a mere oversight. (Petition for Rehearing, R. 4213, Point Ten.)

[4] The prosecution was founded upon circumstantial evidence, therefore it became necessary to prove the acts in order to establish the agreement to act. The crime prohibited was consummated, if it was committed at all. We are not concerned here with any attempt.

to interstate commerce.[5] A strike upon local exhibitors of motion pictures developed the pressure, which coercion produced the money. The trial court erroneously regarded the question of interstate commerce as one of law and decided it in favor of the government (R. 3722, Vol. IV, fol. 11, 166). The Circuit Court fell into the same error and decided the point probably in opposition to applicable decisions of in this court [6] and contrary to the decision of a special court upon the subject.[7]

The statute contains an exception in favor of union labor which has been construed, to some extent, by this court.[8] In the case at bar all the money was obtained by bona fide union[9] representatives.[10] Your petitioners did not obtain any money directly. They had no dealings whatever with the victims. They made no threats and exercised no coercion. They acted entirely through the union agents. Your petitioners might be said to have been undisclosed principals on the government theory.[10a] A proper construction of the Act, as indicated by this court [11] would have required the trial court to do one of two things:

(1) to hold that the exception gave immunity as a matter of law, or

(2) to hold that this case presented a mixed ques-

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[5] We hope to make it clear that we are not disputing the facts proved. We agree with the Circuit Court that the facts in reference to this feature were undisputed. (Petition for Rehearing, R. 4210, Point Three.)

[6] Pennsylvania Company v. Donat, 239 U. S. 50; Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230.

[7] Fox Film Co. v. Trumbull, 7 Fed. (2) 715.

[8] United States v. Local 807, 315 U. S. 521.

[9] International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada affiliated with the American Federation of Labor and known as the IATSE.

[10] Those who obtained money were as follows: Browne, President of the union and a vice president of the American Federation of Labor. Bioff, his accredited assistant, and one of the defendants, Kaufman, a local union representative. (Kaufman disputes the matter.)

[10a] That is they were in fact undisclosed until certain hearsay and state of mind testimony was improperly admitted.

[11] United States v. Local 807, 315 U. S. 521.

tion of law and fact to be decided by the jury under guidance as to the law from the court.

The trial court did neither. It decided the issue as one of law in favor of the government (R. 3735, Vol. IV, fol. 11, 293).[11a] The Circuit Court sanctioned this departure by reliance upon a decision in another circuit[12] and by disregarding and refusing to heed a more recent applicable decision of this court.[13]

The trial court permitted the victims to give hearsay evidence as to what they had in their mind at the time they paid the money (R. 1355, Vol. II, fol. 4064; R. 1467, Vol. II, fol. 4401; R. 1556, Vol. II, fol. 4668; R. 1660, Vol. II, fol. 4978; R. 1728, 1799, 1801, Vol. II, fol. 5401). These conclusions were expressed, for the first time, some years after the event. In substance, the witnesses claimed that they feared murder, bombings, violence and ruination which a strike would entail. The trial court erred in believing that a case in the New York circuit[14] decided the point in favor of the government (R. 961, Vol. II, fol. 2881). The case relied upon is easily distinguished from the case at bar.[14a] The Circuit Court sanctioned the departure by the trial court contrary to and without a mention of the controlling decision upon the point rendered by this court.[15] The judges of the Circuit Court disagreed among themselves concerning whether the rule of evidence

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[11a] We have appended the charge of the Court to our brief. To which we have added notes showing the numerous errors sanctioned by the Circuit Court.

[12] Nick v. United States, 122 Fed. (2) 660 (C. C. A. 8).

[13] United States v. Local 807, 315 U. S. 521.

[14] Greater New York Live Poultry C. of C. v. United States, 47 Fed. (2) 156.

[14a] We have distinguished the New York Poultry case in our brief.

[15] United States v. Local 807, 315 U. S. 521.

should be any different in conspiracy than in cases where the substantive crime is charged.[16]

Some of your petitioners did nothing within three years of the indictment. If your petitioners were ever in the conspiracy, it was a fair debatable question for the jury as to whether some of your petitioners had withdrawn. The trial court ruined this defense by telling the jury that if other defendants committed acts within three years, none of your petitioners could avail himself of the statute of limitations (R. 3733, Vol. IV, fol. 11, 199). The Circuit Court sanctioned this departure.[17]

The trial court explained to the jury the right of your petitioners to a review (R. 3712, Vol. IV, fol. 11, 136), contrary to the established practice. This departure was sanctioned by the Circuit Court without any mention of the error.[18]

The prosecutor, in his argument (R. 3611, Vol. IV), recognized no bounds. The trial court refused to make the slightest effort to protect your petitioners against the prejudice improperly created.[19] Among other things, the prosecutor asked the jury to help him in his contemplated prosecution of other persons, said by him to be the higher ups, by returning a guilty verdict against your petitioners (R. 3710, Vol. IV, fol. 11, 129). The evidence disclosed that after the principal witnesses for the government in the case at bar had been convicted, they de-

16 We submit that your Honors have held the evidence is improper (United States v. Local 807, 315 U. S. 521) and that your honors' decision should control in conspiracy and also where the substantive crime is charged.

17 This sanction is made without a correct statement of our point in the opinion of the Circuit Court. (Petition for Rehearing, R. 4215, Point Fourteen.)

18 Although called to the attention of the Circuit Court again on petition for rehearing (R. 4215, Point Seventeen).

19 We have quoted numerous instances of the misconduct of the prosecutor from the record, in an appendix to our brief.

cided to help to prosecute your petitioners. The prosecutor explained to the jury that a guilty verdict might cause some of your petitioners to turn informers. This misconduct, on the part of the prosecutor and failure of duty on the part of the trial court, was approved by the Circuit Court.[20]

After the jury had retired to deliberate, the trial judge visited the jury room in the absence of your petitioners and the attorneys (R. 3744, Vol. IV, fol. 11, 232). The Circuit Court concluded that this was a mere "informality" in this case, which "informality" did not prejudice your petitioners. This decision, we submit, is in conflict with the holdings of this court.[21] The Circuit Court said that it appears with certainty that no harm had been done. This is not true, because the record is silent, through no fault of your petitioners, as to what transpired while the judge was in the jury room. Your petitioners and their counsel knew nothing of this visit until the judge said from the bench that he had "stopped in the jury room" (R. 3744, Vol. IV). The certainty of the Circuit Court, in the absence of proof, that no prejudice resulted is in conflict with a decision on the point in another circuit.[22]

The trial consumed over eleven weeks, and the record contains over four thousand printed pages in five volumes. We have endeavored to indicate that the questions involved do not require consideration of the evidence in

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[20] Here again the Circuit Court did not see fit to state the nature of our complaint. It dismissed the entire matter by holding that the prosecutor was within "permissible limits." (Also see Petition for Rehearing, R. 4217, Point Nineteen.)

[21] Mattox v. United States, 146 U. S. 140, 150, Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 81.

[22] Little v. United States, 73 Fed. (2) 861 (C.C.A. 10) holding that there should be no communication between court and jury except in open court and discussing the effect of error (867):

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

detail,[23] they remain after your Honors assume, as required, the truth of every fact upon which there is any testimony for the prosecution. The Circuit Court said that we relied upon a claim that there was not enough evidence to support the verdict, and this was our most important point. We did not regard the insufficiency of the evidence as our most important point.[24] We merely tried in vain to convince the Circuit Court that the errors committed in the admission of evidence in the instructions and the misconduct of the prosecutor contributed to the result which might otherwise have been not guilty. We cannot afford to allow the misstatement of our position[25] by the Circuit Court of Appeals to go unchallenged for fear that we do not make it clear here that we come with points requiring the attention of this court.

The Exhibits.

Volume five is taken up largely with exhibits which are of no importance here. They relate mostly to the bookkeeping methods of the victims in obtaining the money for Bioff. Your petitioners had no dealings with any of the victims but Barger, and the fact that Bioff obtained money was never disputed.

B.

Basis of the Court's Jurisdiction.

This Court may by certiorari have this case certified to it for determination under the act of February 13, 1925, 43 Stat. 936, Ch. 229, Title 28 United States Code, § 347,

[23] Your Honors might obtain the entire picture of the case, if considered necessary, by reading the direct examination of the witness Bioff, (R. 100, Vol. I).

[24] Petition for Rehearing, R. 4206, Point Sixteen.

[25] Your petitioners did not delude themselves that the Circuit Court would review the finding of the jury as to the facts.

amending and re-enacting Sec. 240 (a) of the Judicial Code. (Appendix to Rules 306 U. S. 727, 731.) Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716, and Rules for Criminal Appeals, promulgated May 7, 1934. Rule XI.

The opinion in the Circuit Court of Appeals was rendered December 20, 1944 (R. 4191, fol. 4191). The petition for rehearing, filed within the time allowed, was denied on January 8, 1945, (R. 4202, fol. 4241). The judgment and order for mandate was entered January 11, 1945, (R. 4203, fol. 4243).

C.

Questions Presented.

Venue.

1. In a criminal prosecution where it appears that the defendants have been removed from the district of their home for trial and the only allegation as to venue is a charge that the conspiracy was formed in the district of trial, can the conviction be sustained where the undisputed evidence shows the formation of the conspiracy in the district from where the defendants were removed.

Is the answer to this question affected by evidence showing that some of the conspirators performed acts within the district of trial in furtherance of the conspiracy if it be kept in mind that there are no overt acts alleged, and that the performance of such acts are not referred to in the pleading?

Exception.

2. The Act makes certain exceptions in favor of union labor. Where labor officials are charged with a violation, is it proper for the trial judge to decide, as a matter of law, that the exceptions do not apply, or must the question be submitted to the jury under proper instructions?

a. In a case where the evidence shows that the labor officials used legitimate union demands, coupled with the threat of strike, in order to obtain money for their personal use, while at the same time securing benefits for the union members, can the trial judge determine, as a matter of law, that the tainted objectives of the union officials eliminates all consideration by the jury of the exception, or must the entire matter be left to the jury under proper instructions as to the exceptions?

b. When it is made to appear in a prosecution under the Act that the money was obtained by duly elected union labor officials of a legitimate labor union, should the trial judge direct a verdict, regardless of the further showing that the officials have been false to their union and have used the power of the union to obtain money for their own use?

c. In view of the fact that the legislative history of the Act shows that it was intended to suppress terroristic activities of professional gangsters and not to interfere with traditional labor union activities, how is the law to be applied where money is obtained by union officials who do not disclose that any one else is concerned and where the employers pay over the money because they fear that the union officials are capable of using a strike, coupled with violence, under the pretense of a demand for wages, and it is revealed, after the event, that undisclosed persons were behind the scenes and were profiting by the shakedown. Should the trial judge submit such a case to the jury under proper instructions as to the meaning of the exception, or is it lawful for the judge to determine, as a matter of law, that the exception does not apply?

d. To put the question in the language employed by the Circuit Court of Appeals, if the accused at bar were not

concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen, but to feather their own nests, did they "coerce" their victims within the meaning of the section?

e. If the evidence can be so construed, is it proper for the judge to take the matter of the exception from the jury?

f. Would the answer be affected if wage disputes and benefits to workmen were shown by the evidence and the desire for money on the part of the labor officials was only one of several objectives?

g. In a case where the union members are ready and claim to be able to do the work but the employer prefers to employ a substitute, and is coerced to pay the union members wages to stand by, does the Act apply, and who determines if a crime results, the judge or the jury?

h. If instead of wages being paid the employers and the union officials agree upon a lump sum, does such method of settlement alter the situation?

i. Does it matter, in any of these cases, whether the union official turns the settlement money into the union or keeps it? Would the fact that he kept the money and divided it with persons not members of his union alter the situation? Here again is the final decision in the hands of the judge, as a matter of law, or should it be submitted to the jury?

j. If a union official is in a position to force the employer to employ more men for a particular job (two men in a booth) and the official takes money instead of enforcing the union demand and the proof shows that the employer paid the money because of his fear of a strike, can the trial judge hold, as a matter of law, that the exception in the act does not apply, or should the judge submit the matter of the exception to the jury? Or should the

judge hold that no crime has been committed under the Act, by reason of the exception, and in such case should the judge order an acquittal?

k. Were these defendants tried in a manner consistent with the proper meaning and scope of the pertinent provisions of the Act?

l. Did the trial court fail to instruct the jury properly with respect to the exception?

m. Where it appears from the evidence that a labor organization of good repute and honest purpose has been misdirected and has become an agency of blackmail, is it proper for the trial judge to determine, as a matter of law, that the exception does not apply, and to hold that the jury should not be informed of it?

n. Did Congress intend that the labor officials, false to their trust, should be immune, in order to prevent the use of the Act against traditional labor methods?

o. Did Congress intend that the labor officials should not be immune, but that a jury should determine whether or not in each case their activities were illegal under the Act?

p. What are the limits of the exception, assuming the presence of violence and threats, where the prosecution is against officials of a union of good repute and honest purpose, where it appears that the officials combine the securing of benefits for the union with obtaining money for themselves?

State of Mind.

3. In considering the above question, is the test of the applicability of the exception in such case the objective of the conspirators or the state of mind of the victims?

a. How is the fear of the employer and his reasons for payment to be established, by facts and circumstances, including conversations with the extortionists at and before the payment, or is it proper to add the feelings and state of mind of the victim as described by him at the trial? If this state of mind evidence be admissible, is it also proper for the victim to narrate his experiences in the past as to the result of strikes, including violence, murders, bombings and damage to his property and business, in order to fully show his state of mind? Is hearsay evidence not connected with the conspirators proper in order to show the knowledge and state of mind of the victim?

b. In considering the admissibility of such state of mind testimony, does it make any difference whether the defendants are charged with the substantive offense only, or with a conspiracy? The judges below divided upon this question.

Interstate Commerce.

4. In a prosecution for conspiracy under the Act, must the agreement include the contemplated performance of an act relating to interstate commerce? The trial court recognized that the answer here is yes; so did the Circuit Court. We state the question as preliminary.

a. Should the language of the statute be taken literally and applied to "any act in any degree" and thus be made to include strikes on local theaters?

b. Do acts relating to the exhibition of motion pictures come within the statute?

c. Is the exhibition of moving pictures interstate commerce, as a matter of law?

d. Is it proper to instruct the jury that the exhibition

of motion pictures is an engagement in interstate commerce?

e. After the trial court and the Circuit Court of Appeals has held that the exhibition of motion pictures is interstate commerce, as a matter of law, is it proper for this court to re-examine the question, and, if warranted, to hold to the contrary?

f. In the case at bar, was this a mixed question of law and fact which should have been left to the jury, under proper instructions?

g. Can the Act be made to apply, as a matter of law, to local conditions, because a strike on a local theater would cause the producers to feel a check upon the interstate movement of their films when the exhibitors are tied up?

h. Can the Act be made to apply, as a matter of law, to a strike on a local theater because the exhibitor did business on a small margin and must have a constant supply of films to keep going at all, and a very short cessation of that supply at the source might destroy the exhibitor and end him forever as an outlet, and thus diminish the business of the producer? Assuming, of course, that the producer is engaged in interstate commerce as to the film.

i. Is it proper to hold, as a matter of law, that the moving picture industry is a unity, that all parts are like those of a single elastic member in which an impact on one part is instantly transmitted everywhere so that therefore any act relating to the exhibition of moving pictures is an act prohibited by the Act and relates to interstate commerce, as a matter of law?

j. Is it proper to instruct the jury that interstate commerce is involved, when it is permissible, from the un-

disputed facts, to conclude that there was no interstate commerce as to the exhibition of moving pictures?

Statute of Limitations.

5. Is it proper for the court to take from the jury the defense afforded by the statute of limitations?

a. Is it proper for the court to instruct the jury, as to conspirators who may have withdrawn, that any act of their co-conspirators (including the accomplice witnesses) within three years will destroy the defense as to all?

Hearsay.

6. May a defendant be connected with a conspiracy and convicted upon hearsay evidence?

Deception.

7. Is it proper to sustain a conviction when it appears from the entire record that the prosecutor purposely adopted a course calculated to deceive the defendants as to that which they were to meet and relief has been denied below? The scheme of the prosecutor is revealed by the record which discloses:

a. A false allegation as to venue.

b. A date which is obviously not one to be relied upon.

c. A mere conclusion that the conspiracy was a continuing one, covering a long period of years from some unnamed beginning to the return of the indictment.

d. An indictment which merely follows the language of the Act furnishing mere legal conclusions with no facts and concealing the real nature of the charge.

e. Resistance to the granting of a motion for a bill of

particulars and the refusal of any information of the nature of the charge.

f. The concealment of a known conspirator, Rio, under the false allegation that he was unknown, coupled with the fact that Rio has been dead for some years and the accomplice witness testified to a great many important transactions with him, said to bind your petitioners in their absence.

g. The concealment of Barger as a victim, when it appears that he was known to the grand jury, coupled with the fact that Barger furnished the only evidence on some important links, including the elimination of the statute of limitations.

Instruction.

8. Is it proper for the court to explain to the jury the right of the defendants to a review?

Communication With Jury.

9. May the trial court be permitted to communicate with the jury after retirement, in the absence of the defendants and counsel?

a. After the Circuit Court of Appeals has found that the judge visited the jury room, is it proper for that court to hold that this was an "informality" and that "it would be the merest pedantry to insist upon procedural regularity"?

b. After the Circuit Court of Appeals held that it appears with certainty that no harm has been done and that no prejudice to the accused resulted, will this court accept such finding or will your Honors examine the record in connection with the defendants' assertion here that the

record will not support an affirmative finding that the error was necessarily harmless.

c. Will this court hold with the second circuit, as in the case at bar, or with the tenth circuit which holds, in *Little* v. *United States,* 73 Fed. (2), 861, 867, that:

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

Misconduct of Prosecutor.

10. Were the actions, conduct, argument, methods employed and statements made by the prosecuting attorney so prejudicial to the petitioners' right to a fair trial as to call for the exercise of the power of supervision in this Court?

D.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has sanctioned a departure by the lower court from the accepted and usual course of judicial proceeding.

a. The failure to recognize at some time, before, during, or after, the trial, that the indictment was calculated to mislead and furnish no information, and calculated further to allow the prosecution to be practically unlimited in the scope and range of the evidence.

b. To permit the prosecution to transport the defendants for trial upon a false allegation as to venue.

c. To take from the jury important issues made proper by the Act relating to the conduct of labor officials.

d. To take from the jury the question as to whether interstate commerce was affected in a manner prohibited.

e. To take from the jury the defense afforded by the statute of limitations.

f. To admit improper and prejudicial hearsay evidence as to the state of mind of the victims.

g. To hold that the exhibition of motion pictures is interstate commerce and that the evidence of Barger was proper. Barger, as we have said, being not named or described as a victim, and it appearing that his complaints had no connection with the charge made.

h. To allow the admission of hearsay evidence and then instruct the jury that same could be used in connecting the defendants with the conspiracy.

i. To explain to the jury the right of a defendant to a review.

j. To enter the jury room during the deliberations of the jury.

k. To permit the prosecutor to inflame the jury and appeal to prejudice and depart from all known rules of procedure in the presentation of evidence and in argument.

2. The Circuit Court of Appeals has decided federal questions in a way which conflicts with the decisions of this court.

a. This court has indicated, as to each of the above departures, that they are not consistent with justice and a fair trial. We know of no case in which your Honors were called upon to deal with so many departures in one trial.

b. The Circuit Court of Appeals decided many questions, presented herein, in conflict with the decision of this court in *United States* v. *Local 807*, 315 U. S. 521. The Circuit Court of Appeals does not even mention the decision of this court and does cite and follow the case of *Nick* v. *United States*, 122 Fed. (2) 660, upon points which

were decided to the contrary by this court in the more recent case of *United States* v. *Local 807*, 315 U. S. 521.

c. In holding that the exhibition of moving pictures is interstate commerce, the Circuit Court not only ignores the case of *Fox Film Co.* v. *Trumbull*, 7 Fed. (2) 715, but decides the point contrary to the decision of this court in *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230. Also in *Schecter Poultry Corporation* v. *United States*, 295 U. S. 495.

d. In holding that the question of interstate commerce may be taken from the jury, the Circuit Court conflicted with the decision of this court in *Pennsylvania Company* v. *Donat*, 239 U. S. 50.

e. In holding that the jurisdiction of the federal court is extended to every local theater strike, the Circuit Court here conflicted with that which was said by this court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

f. In holding that the entry of the judge into the jury room during its deliberations is a mere informality, the Circuit Court decided the point in a manner probably in conflict with the decisions of this court.

g. In holding that the prosecutor was within permissible limits in his argument, the Circuit Court conflicted with the decision of this court in *Berger* v. *United States*, 295 U. S. 78.

3. The decision of the Circuit Court of Appeals is wrong.

a. The Circuit Court of Appeals answered each question presented herein contrary to the law and justice.

4. Conflicts exist between various circuits in the Circuit Courts of Appeals upon points involved here.

a. The Circuit Court, in the case at bar, conflicted with *United States* v. *New York Great Atlantic and Pacific Tea Company*, 137 Fed. (2) 459 (C.C.A. 5), in holding that the variance as to venue is unimportant.

b. The Circuit Court here conflicted with *United States* v. *Riley*, 74 Fed. 210 (C.C.A. 6) in holding that a variance as to the victim (Barger) was trivial.

c. Upon the matter of proper instructions to the jury on the subject of the statute of limitations, particularly as to those who might have withdrawn, the decision of the Circuit Court in the case at bar conflicts with *Buhler* v. *United States*, 33 Fed. (2) 382 (C.C.A. 9).

d. In refusing to properly instruct that the burden was upon the government to prove interstate commerce the decision of the Circuit Court here conflicts with *McAdams* v. *United States*, 74 Fed. (2) 37(C.C.A. 8).

e. Upon the effect of error committed by an outsider communicating with the jury after retirement, the Circuit Court here conflicts with *Little* v. *United States*, 73 Fed. (2) 861 (C.C.A. 10). There is a conflict among the various circuits as to the effect of this error and particularly the construction of Section 391 of Title 28 U.S.C. The conflicting cases are cited and summarized in *Little* v. *United States*, 73 Fed. (2) 861 (C.C.A. 10).

5. If the prosecution is to be permitted to sustain a false allegation of venue, any citizen may be transported for trial into the district thought to be to the advantage of the government.[26]

a. A reading of the decisions of the federal courts will bear the conclusion that the government officials have

[26] A defendant will be compelled to go through a trial in each instance, and then claim a variance. The indictment will always be good on its face.

prosecuted chain stores in Texas,[27] where such business is not in favor; the oil companies in Wisconsin[28] where the petroleum industry has the least business and here they take those charged with racketeering to New York, where market conditions in food and clothing have become a public scandal.[29] This court should recognize the importance of the fact that if the courts are to hold public confidence, they should not only avoid evil, but that they must avoid the appearance of evil. In the case at bar the trial court overruled all motions without requiring the prosecution to furnish any reason, good or bad, as to why New York should be selected, and by what right, under the law, the government should be permitted to prosecute a Chicago group in New York. The Circuit Court dismissed the matter as trivial. This court should feel bound to justify such practice if it be correct and legal, or to condemn it and uphold the constitution, if it be wrong. The power of supervision here is required for the reason that the courts below failed in their duty to either uphold the scheme and support the government upon legal grounds if any such could be found, or to rule with your petitioners. Evasion is harmful to the public reputation of judicial proceedings.

6. The constitutional rights of a defendant to be informed of the nature of the charge should not be nullified by permitting this conviction to stand, after it is found that not only was the venue allegation false, but the indictment was also false as to that which was known to the grand jury as to the conspirators and as to the victims. It furnished no reliable information as to date, time, place or persons.

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[27] United States v. Safeway Stores, 51 Fed. Supp. 448.

[28] United States v. Socony Vacuum Oil Co., 310 U. S. 150.

[29] Greater New York Live Poultry C.C. v. United States, 47 F. (2) 156.

7. If this conviction is to be sustained, it means that a federal judge has a right to consider the conduct of a labor official and decide, as a matter of law, that the federal courts have jurisdiction, and that the exception does not apply, and to decide further that the jury should not hear of the exception.

a. The question important to the public generally and to millions of laboring people, presented here, is of far more importance than the fate of these defendants. The Circuit Court indicated that the result was correct here and the manner in which it was arrived at is of no importance. This court should exercise its supervisory powers not only to correct the errors committed, but to furnish a correct guide for future action. Did Congress intend that a federal judge should have the final say as to the objectives of the elected officials of accredited unions? Your Honors know very well that in every conflict between employer and labor, some evidence could be produced, to satisfy the mind of the employer at least, that the labor official had been false to his trust and that his asserted objective as to labor gains was a mere pretense. It is of vital importance that the labor official, good or bad, be afforded a jury trial and that the judges know how to apply the law in future actions.

The decision of this court in *United States* v. *Local 807*, 315 U. S. 521, does not answer all of the questions presented here. Did Congress intend that a federal judge should nullify the exception when the labor official conspires with others not in his union, and he "feathers his nest" by virtue of his power to call a strike? This we submit is an important question of great public interest.

8. We submit that if the trial judge is correct in the case at bar, every local strike in the moving picture industry would be brought within the jurisdiction of the federal

courts, if it be claimed by the employers that they paid money in fear of the power of a union or its officials.

a. Considering the constitutional barriers and the broad language of the Act, this presents an important question of federal jurisdiction.

9. If the Act is to be construed as in the case at bar by the trial court and the Circuit Court of Appeals, it is unconstitutional and not within the power of Congress.

a. This court held that the Act was within the power of Congress in *United States* v. *Local 807*, 315 U. S. 521, but in that case trucks were passing state lines and there was no occasion to consider the extent of its application to local affairs, such as the exhibition of motion pictures. A decision upon this point would control in many other industries.

E.

Prayer.

Your petitioners have filed the record of the Circuit Court of Appeals in this case and have complied with the rules of this court in all other respects and pray that such orders be entered as may be required for your Honors to take jurisdiction by certiorari, and that the judgment be reversed and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Respectfully submitted,

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PHIL D'ANDREA, CHARLES GIOE,
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Petitioners,

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Counsel for Petitioners.

February 7, 1945.